

NA 04-0184-C H/H Abel v. Rockwell Automation
Judge David F. Hamilton

Signed on 02/23/07

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

CLAUDIA ABEL,)	
FRANK TAFF,)	
JUDY RAYLS,)	
RICHARD BOYD,)	
)	
Plaintiffs,)	
vs.)	NO. 4:04-cv-00184-DFH-WGH
)	
ROCKWELL AUTOMATION, INC.,)	
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

CLAUDIA ABEL, FRANK TAFF,)	
JUDY RAYLS, and RICHARD BOYD,)	
)	
Plaintiffs,)	
)	CASE NO. 4:04-cv-0184-DFH-WGH
v.)	
)	
ROCKWELL AUTOMATION, INC.,)	
)	
Defendant.)	

ENTRY ON PENDING SUMMARY JUDGMENT MOTIONS AND
DEFENDANT'S MOTION TO SEVER

Plaintiffs Claudia Abel, Frank Taff, Judy Rayls, and Richard Boyd have sued their former employer Rockwell Automation, Inc. for age discrimination in terminating their employment at Rockwell's manufacturing plant in Madison, Indiana. Rockwell has moved for summary judgment on all plaintiffs' claims and has moved to sever the trials of claims that might survive summary judgment. Rockwell contends it terminated Abel, Tabb, and Rayls as part of a reduction in force motivated solely by economics. Rockwell contends it terminated Boyd for poor performance.

As explained below, plaintiffs have come forward with sufficient evidence to defeat summary judgment on the age discrimination claims under 29 U.S.C. § 623. Viewed as a whole, and giving plaintiffs the benefit of conflicts in the

evidence and favorable inferences that may be drawn from it, the evidence would allow a reasonable jury to find that Rockwell management felt the workforce at the Madison plant was too old and deliberately decided to reduce the employment of older workers. However, Rockwell is entitled to summary judgment on plaintiffs' claims under Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140. Plaintiffs have not come forward with evidence that Rockwell acted with the specific intent to deprive them of employee benefits. Also, because all four plaintiffs advance the same theory of discrimination and rely on a substantial core of common evidence, the court finds that separate trials would not be advisable.

Summary Judgment Standard

When deciding a summary judgment motion, a trial court is required to view any evidence in the light reasonably most favorable to the non-moving parties. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255 (1986). The court may not make credibility determinations, weigh the evidence, or choose from among different reasonable inferences that might be drawn from the evidence. *Paz v. Wauconda Healthcare and Rehabilitation Centre, LLC*, 464 F.3d 659, 664 (7th Cir. 2006) (reversing summary judgment); *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003) (reversing summary judgment). "[B]ecause summary judgment is not a paper trial, the district court's role in deciding the motion is not to sift through the evidence, pondering the nuances and inconsistencies, and decide whom to

believe.” *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). The court’s only task is to determine if material questions of fact remain which require a trial. Accordingly, the facts set forth here are not necessarily accurate, but reflect the evidence in light of the summary judgment standard.

Facts for Summary Judgment

Claudia Abel began working at Rockwell’s predecessor in April 1966. At that time the Madison manufacturing facility was thriving and employed approximately 500 people. Abel had numerous job titles over the years including timekeeper, expediter, planner coordinator, production coordinator, material coordinator and production clerk. The jobs with “coordinator” in their title involved many of the same types of tasks, such as preparing assembly and rotor area paperwork, stock room and finished part clerical responsibilities, as well as filling in for supervisors for short periods of time. In 2003 she started the year as a Production Coordinator. She was later moved to another position, which Rockwell described as a Material Control Coordinator. Rockwell terminated her employment on November 17, 2003, when she was 60 years old. The workforce that had been 500 strong in the 1960s had been cut to approximately 250 by that time, and the facility was losing money due to a decline in business.

Judy Rayls began her employment in 1968. She was also a Production Coordinator in March 2003 when she was told that the job she held was being

eliminated and her employment could be terminated. She too had held jobs with various titles, including material, production and planning coordinator positions. She too was moved from a Production Coordinator slot to a Material Control Coordinator position in March 2003. However, like Abel, she says that after that point she still spent most of her time doing what she had done previously and training others to handle those tasks as well. She was 58 years old on November 17, 2003, when she was also told that her employment with Rockwell was over.

Rockwell terminated the employment of Frank Taff the same day it let Abel and Rayls go. Taff started working at the Madison facility in 1962. When the company ended his employment in November 2003, he was a Quality Engineer and 60 years of age. Unlike Abel and Rayls, Taff had been recently criticized for poor performance and was under significant scrutiny at the time of his departure. So too was the performance of Richard Boyd, the fourth and final plaintiff, who had also been on the payroll since the 1960s. According to Rockwell, Boyd's performance was so lacking that it decided to fire him effective January 12, 2004, when he was 53 years old.

Stuart Cheek began employment as Plant Manager in August 2002. He claims to have been assigned to bring the Madison plant back to profitability, or at least to a break-even level. Initially, during his tenure as Plant Manager, there was a fair amount of optimism that the business could grow. As customer orders

continued to wane, so did that optimism. By September 2003, the Madison plant's business had become worse and the goal of profitability was even further away. More urgent discussions began between the plant and Rockwell's higher management. Closing the plant was even discussed. Cheek describes his plan to address the declining financial situation at the facility as trying to "right size" the business and increase efficiencies. He says by "right-sizing" he means working with a recognition that the business was not a growth business and structuring the plant to be profitable at the level of business that did exist. More of a goal than a plan, Cheek never put into writing any specific approach to "right-sizing," and Rockwell's headquarters gave him no specific directive to reduce the workforce.

Assisting Cheek with the issue of the size and make-up of the workforce was Jack Kikta, the plant's Human Resources Manager. Kikta began working for Rockwell in 2001 and was the Human Resources Manager throughout his employment at the Madison plant. A part of his responsibilities included being involved in all employee terminations. Because of the financial problems at the plant, staffing meetings took place on the average of once every six weeks and included Cheek, Kikta, and appropriate supervisors. With poor results from the fiscal year ending in September 2003, the plant managers felt increased pressure in the fall of 2003 to cut overhead in the form of lower level indirect hourly and salaried labor and support.

Don Kring was the Materials Control Manager at the plant. As Production Coordinators, who at times were referred to as Planner Coordinators, Abel, Rayls and Laurie Wolf, who was 41 years old, worked under Kring. In 2003 the Madison plant was implementing a new computer software system known as "Powerman." Also during that year, in an effort to improve efficiency and oversight structures, the plant decided to adopt a type of management structure that had proven successful at other Rockwell plants. Four engineer, supervisor and planner teams, which were three member teams referred to as "ESP teams," were assigned to manage and oversee the daily activities of specific areas of the plant. The three members of each team were exempt management-level employees charged with meeting customer requirements in a timely and cost efficient manner. Kring's job was to implement the ESP team management, defining their responsibilities and planning for their interaction with the new Powerman system. Choosing the members of each team was a decision left to Kring, Cheek and Kikta. Abel, Rayls, and Wolf were not selected to serve as the "planner" on any of the ESP teams. It is doubtful that any of the three were qualified for the position.

The Production/Planner Coordinator positions that Abel, Rayls and Wolf held were hourly non-exempt positions. Many of the job responsibilities were clerical, and the Powerman software reduced the need for such a position. Beginning in March 2003, Abel and Rayls were moved to Material Control Coordinator positions as Rockwell began rolling out Powerman. It is unclear what the title of the position was that Wolf was moved to, though at least one document

suggests she too was called a Material Control Coordinator. Her new position was in the office, as opposed to on the floor of the manufacturing plant, and Wolf was assigned to take care of bills of material. According to Kring and Kikta, all three of these individuals were placed in these positions temporarily to see if increased business might allow them to stay on in some other capacity.

Business did not increase, and on November 17, 2003, Kring and Kikta informed Abel and Rayls that their “temporary jobs” had been eliminated. Though Rockwell had thought that Wolf’s assignment was merely stop-gap as well, after Powerman was fully implemented, Rockwell claims to have determined that the work Wolf was performing with the bills of material was still necessary so that she retained her employment under the title of Engineering Coordinator. Cheek posted a plant memo in November 2003 that stated in pertinent part:

As all of you are aware the plant has struggled financially for the last several years. There are a lot of reasons for this but to a large degree they are related to the amount of business we have and the amount of overhead that we keep to support this business. Our plan for 2004 which started in October was to grow an additional 11% over 2003. If we were able to do that then we would have been staffed appropriately. However, as of this morning we are 81% of plan on orders. In order to keep the financial plan intact I opted to reduce three positions in the support areas of the plant through a layoff. These three positions are Frank Taff (Quality Engineer), Judy Rayls (Materials Coordinator), and Claudia Abel (Materials Coordinator).

The direct labor force is at the right level for current business levels. . . .

The indirect support areas are an important part of making productivity as well. Unfortunately indirect positions are always scrutinized more closely because they are more difficult to measure. It should be our goal to make improvements in the plant that minimize the need for indirect jobs. With

the layoffs this morning, I don't foresee another correction needed unless business doesn't come back later in the year.

Though listed in the memo as just another victim of the RIF, Rockwell claims Frank Taff's position was eliminated in large part because of his poor performance. Neither Abel nor Rayls was said to be a poor performer. Taff was a Quality Engineer, which is a salaried non-production position. He supervised some non-exempt employees and was principally responsible for handling quality issues with suppliers, returned goods, and customer complaints.

Near the beginning of April 2003, Taff's supervisor Greg Wyne submitted his resignation. As Quality Assurance Manager, Wyne had been Taff's supervisor for several years and had no problem with Taff's performance. But Plant Manager Cheek did have problems with Taff's performance and in fact directed Wyne to change Taff's annual performance review from an overall rating of "exceeds expectations" to the lower "successful." On April 2, 2003, Wyne wrote on Taff's review that he was "asked/told" to change the rating because Taff was "too highly compensated for the tasks he performed." Wyne also expressed in his notes why he felt his original evaluation was accurate. Kikta went through the entire written review and made marginal notes as to where Wyne should lower the various specific ratings he had previously assigned Taff. The review was later changed to reflect those reduced assessments.

On April 23, 2003, Cheek met with Taff to discuss his performance problems and to inform him that he would be working under the supervision of Ken Boucher, the Manufacturing Manager. Later that year Taff's supervisory duties over "receiving inspection" were taken away from him, and his grade and pay were lowered. According to Taff, the last six months of his employment were confusing because he received conflicting direction given as to how the changing operations of the department and his responsibilities were supposed to mesh, yet he was being criticized or counseled by Cheek, Kikta and Boucher on a regular basis. In a very short period of time, his situation changed from having just a few criticisms in his annual review to receiving constant criticism on nearly every aspect of his performance.

On September 2, 2003, Taff received a formal written warning from Kikta indicating that his performance had to improve or he would be terminated. Kikta provided a list of duties that needed immediate attention. A later e-mail from Boucher to Kikta suggests that Taff's destiny had already been decided. On October 15, 2003, Boucher sent Taff an e-mail asking if he had certain tasks completed, in light of circumstances Boucher observed that were inconsistent with the tasks being finished. He then forwarded that same e-mail to Kikta with the following message: "Jack, Frank appears to have lost his focus, I sent this note as a reminder, I will add it to his file. This will help our cause when needed." Perhaps there were additional documents in the file Boucher kept on Taff that

could help shed light on the meaning of “our cause,” but any such documents were destroyed by Boucher when he retired on March 31, 2005.¹

Plaintiff Richard Boyd was not subject to the November 2003 reduction in force. His employment with Rockwell ended shortly thereafter on January 12, 2004. Boyd was a Manufacturing Engineer whose performance, according to Rockwell, was below expectations. There is no dispute that his performance had been adequate for a number of years. Rockwell asserts that as it raised expectations due to the plant’s financial difficulties, Boyd failed to raise the level of his performance.

In May 2001, Boyd received a rating of “successful” in his evaluation as a Manufacturing Engineer from Kenneth Lanham, his supervisor and the Industrial Engineering Manager. Project Engineer would have been the next promotion for Boyd, but his 2001 evaluation said he was functioning only marginally as a

¹Boucher retired on March 31, 2005, well after discrimination charges were filed in early 2004 and after this lawsuit was filed in August 2004. He retired well after he was identified in discovery as a person with relevant information and in possession of relevant documents. Before Boucher retired, plaintiffs had already requested that such documents be produced. Plaintiffs made the destruction of those documents the subject of a motion for sanctions in this case. Magistrate Judge Hussman concluded that Boucher probably did not throw out his files in an intentional effort to destroy evidence for this case. However, Judge Hussmann also concluded that the consequences were prejudicial and could have been avoided if Rockwell or its counsel had properly instructed a person that they had identified as having information relevant to plaintiffs’ claims to preserve any relevant documents. This judge agrees with Magistrate Judge Hussmann’s conclusion and his suggested sanction that the jury be instructed that it may infer that the documents would have been harmful to Rockwell’s defense of Taff’s claim.

Project Engineer and needed to improve. His evaluation stated that he would be reviewed again in six months after the project he was in charge of was complete. Though the project at issue was running a bit behind schedule, at the time of the review, Lanham felt that Boyd was still on a path to eventual promotion.

In February 2002, Lanham was asked to perform what he described as a “pre-review” of Boyd.² Such a review prior to an employee’s normal annual review was usually conducted only on new employees. When Lanham asked Dale Minor, who was Plant Manager prior to Cheek, why he was to perform such a pre-review, he was told, “You don’t want to know.” Lanham rated Boyd as “needs improvement” in this February 2002 review and provided goals for Boyd to meet in order to bring his performance back up to acceptable levels. That same month Kikta added a memo to Boyd’s personnel file noting his tardiness in completing certain projects.

Lanham evaluated Boyd again at the beginning of June 2002 and rated him as “successful.” After reviewing the evaluation, Kikta told Lanham that he did not think Boyd had performed any better over the preceding few months and did not deserve to be rated that high. In light of the earlier pre-review, Kikta thought a “needs improvement” rating was more apt. Kikta says that Lanham told him he would not give anyone less than a satisfactory rating as Lanham was “headed out

²Lanham was asked to complete a pre-review on Thomas Grumblatt as well. Grumblatt was originally a plaintiff in this lawsuit, but his claims were dismissed by agreement in April 2006.

the door” to retirement. Lanham testified that there was a disagreement as to how Boyd should be rated and that as a result of that disagreement, he changed the rating to “needs improvement.” In any event, the overall rating and several categorical ratings were lowered on Boyd’s June 2002 review.

After Lanham retired in the summer of 2002, Troy Armstrong became his supervisor. Contrary to plant policy, Armstrong did not complete another review of Boyd until the end of November 2003. Boyd received a “successful” or numerical 3 rating in one of the four subcategories of that review, two “needs improvement” or numerical 4 ratings, and a single “unsatisfactory” or 5 rating. The overall rating given to Boyd on the review was 5, designating “unsatisfactory.” According to Lanham (and consistent with the other reviews in the record in this case), a supervisor typically totaled the points from the subcategory ratings, divided by the number of subcategories, and provided that average (at times rounded) as the overall rating. In Boyd’s case, that average would have been a 4 or “needs improvement.” A “needs improvement” rating at the plant was not a good one — it could be the start of a road leading to termination. But it did not generally result in immediate loss of a job. Despite the average score being a 4, in this instance Boyd was given an “unsatisfactory” rating, and a Human Resources Change Form was placed in his file that showed a performance rating of 5, though when looking at the form one can see that the rating was clearly altered from an original entry of 4. On December 8 and 9 of 2003, the form was

signed and dated by Armstrong, Kikta and Cheek. The form states that its effective date was March 31, 2003.

In December 2003, one of two dies used in a press in the Frame Department was broken due to operator error. At the time, the back-up die had been sent to a repair shop for a sharpening and repair estimate. The newly broken die was sent to the same shop for a repair estimate by Boyd, who told the shop that something needed to be done quickly because the press could not be operated without a die. The repair shop fixed both dies without a requisition and returned them to the plant with a bill for the repairs. Armstrong took issue with the lack of competitive bidding for the die repairs and asked Boyd to explain the situation. Boyd explained what happened, but Armstrong later sent an e-mail to Cheek with the vendor's repair bill indicating that Boyd had left on vacation for the holidays without responding to Armstrong's inquiry regarding why he had not sought competitive repair bids. After receiving Armstrong's e-mail on December 16, 2003, Cheek responded that same day indicating that he wanted Boyd removed by January 12, 2004.

Kurt Sundling began working for Rockwell at its Madison facility in January 2003. He was the plant's information technology manager and attended various meetings of management. On a few occasions he went to lunch with Kikta and Brandon Taylor, another IT employee. Sundling says that at these lunches, both Kikta and Taylor would often discuss problems with the aging workforce at the

plant. For example they would talk about the older employees having problems using computer hardware or software. According to Sundling, Kikta made it clear that he felt the Madison plant had a problem with an aging, unproductive, and overpaid workforce, and he intended to help fix that problem.

Sundling is a key witness for the plaintiffs.³ He is the source of the bulk of the testimony with regard to statements made by Kikta, Cheek, and others at Rockwell that could be interpreted as showing age bias. He also testified with regard to actions taken by those individuals that were consistent with an intent to pare down the aging workforce. For example, Sundling is the source of testimony that Cheek admitted that he set Frank Taff up to fail in making an important presentation by not giving him enough time to prepare. Sundling also testified that Kikta commented at one of the lunches that Rayls was being sent to work in an area where the conditions might be unbearable for her and cause her to quit. Kikta also told Sundling that the evaluation ratings he gave to an older employee were too high and needed to be lowered. And Sundling claims to have heard Cheek and Kikta discussing the firing of Mike Staley, a younger employee, as a helpful piece of evidence to rebut charges of age discrimination in the firings. Sundling is not the source of all of plaintiff's key evidence, but without his testimony, plaintiffs' case would lose much of its vitality.

³Rockwell contends that Sundling is subject to some credibility challenges. For example, Rockwell asserts that it fired Sundling as a result of a conflict of interest with regard to an information services company that he and Brandon Taylor owned and were running on the side. Such credibility issues cannot be resolved on summary judgment.

Discussion

Plaintiffs can prove discrimination through the direct evidence or through the familiar indirect method developed pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The line between the two methods is not always bright, as indicated by the Seventh Circuit's decisions recognizing that a plaintiff may also prove discrimination through other forms of indirect and circumstantial evidence, sometimes described as a "mosaic" of circumstantial evidence. See *Luks v. Baxter Healthcare Corp.*, 467 F.3d 1049, 1052 (7th Cir. 2006); *Sylvester v. SOS Children's Villages Illinois, Inc.*, 453 F.3d 900, 902-03 (7th Cir. 2006). Direct proof of discrimination does not require something tantamount to an admission of guilt; the Seventh Circuit has often taught that a number of pieces of evidence that individually mean little can be assembled so that, in the aggregate, they support a direct inference of discrimination. *Sylvester*, 453 F.3d at 902-03.

Rockwell has adopted the common defense tactic of examining each piece of evidence separately, arguing that none can be said to demonstrate discrimination directly, and then asserting that some necessary element of the *McDonnell Douglas* template is missing. In this case, however, plaintiffs have assembled a mosaic of direct and circumstantial evidence that could, if believed by the jury, support a reasonable inference of age discrimination. The court must examine the individual pieces of evidence, but it must also keep in mind the whole picture that can be constructed from all of those pieces. See *Paz v. Wauconda*

Healthcare and Rehabilitation Centre, LLC, 464 F.3d 659, 665-66 (7th Cir. 2006) (reversing summary judgment); *Sylvester*, 453 F.3d at 903-04 (same).

Viewed in that way, this record is loaded with credibility issues and genuine issues of material fact. Rockwell questions Sundling's credibility. Plaintiffs question the credibility of Kikta and the effects of documents that might have been altered or destroyed or that are otherwise inaccurate.⁴ Summary judgment simply cannot be used to resolve such credibility contests. *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003). Without the ability to listen to and see the witnesses in person, any determination would lack the safeguards required by our legal system.

Viewing the evidence as a whole and giving plaintiffs the benefit of the generous standard that applies on summary judgment, as the court must, there is enough evidence to support the plaintiffs' theory. The court must accept Sundling's testimony about management's statements that can reasonably be interpreted as expressions of animus against the older workers. The court must combine that evidence with other facts, such as: (1) the youngest of the three Production Coordinators remains employed at Rockwell; (2) evaluations of a number of older employees were lowered; (3) "pre-reviews" of other older

⁴The court has already noted the issue of documents destroyed when Boucher retired. There is also evidence that an older supervisory employee voluntarily resigned to accept retirement benefits because the company had increased the number of hours required of him in the same time period, yet the Human Resources file listed him as having been part of the reduction in force.

employees were ordered; and (4) some HR documents were altered while others reflected inaccurate information. Together, this evidence would allow a reasonable jury to infer that the plant managers made a concerted effort to reduce the number of the Madison plant's older employees.⁵ While Rockwell would prefer to look at each plaintiff's circumstances individually or to highlight the fact that it claims different reasons for terminating each individual plaintiff, plaintiffs' theory is based on the picture or mosaic they say is created when the evidence is examined in the aggregate. A jury will need to examine the evidence as a whole to make the credibility determinations.

The single theory advanced by all plaintiffs also persuades the court that separate trials of plaintiffs' claims would not be efficient or appropriate. Focusing on its individualized approach to defending each plaintiff's claim, Rockwell has asked the court to sever the claims of the plaintiffs or to order three trials (keeping Abel and Rayls together). A jury may find that age discrimination was behind the termination of some but not all plaintiffs. However, the collective evidentiary picture is relevant to each plaintiff individually, and separate trials would require repetition of a great deal of common evidence. Separate trials for these plaintiffs would not be consistent with the goals of efficiency, convenience, and avoiding prejudice embodied in Rules 21 and 42(b) of the Federal Rules of Civil Procedure.

⁵Such a conclusion could be reached even without factoring in the negative inference permitted regarding the loss of documents kept by Taff's supervisor.

Rockwell's motion for summary judgment has merit with respect to a single issue. There is no evidence to support the plaintiffs' claims that their terminations violated ERISA. Section 510 of ERISA, 29 U.S.C. § 1140, makes it "unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan. . . ." To survive a motion for summary judgment on a claim under Section 510, the plaintiff must come forward with evidence that the employer had a specific intent to deprive her or him of plan rights or benefits. *E.g., Isabell v. Allstate Ins. Co.*, 418 F.3d 788, 796 (7th Cir. 2005). Plaintiffs did not respond to the motions for summary judgment with evidence of what plan benefits were provided by Rockwell, let alone evidence that would support an inference that the company fired them with the specific intent to deprive them of any of those benefits. Summary judgment on this issue may have limited practical effect, however, since lost benefits would be part of a remedy under the Age Discrimination in Employment Act if the plaintiffs can prove their principal claims. See 29 U.S.C. § 626; *Moskowitz v. Trustees of Purdue University*, 5 F.3d 279, 283 (7th Cir. 1993) (explaining that ADEA authorizes remedy that includes benefits the employer should have paid the employee but did not because of the employee's age, but not "consequential" damages).

Conclusion

For the reasons discussed in this entry, Rockwell's Motion for Summary Judgment Regarding Plaintiff Frank Taff (Docket No. 53), Motion for Summary Judgment Regarding Plaintiffs Claudia Abel and Judy Rayls (Docket No. 55), and Motion for Summary Judgment Regarding Plaintiff Richard Boyd (Docket No. 57) are granted in part to the extent that Rockwell is entitled to judgment on each plaintiff's claim that he or she was terminated in violation of ERISA. The motions are denied in all other respects. All four plaintiffs' claims that they were terminated in violation of the ADEA remain for trial. Rockwell's Motion to Sever the Claims of Plaintiffs Richard Boyd and Frank Taff or for Separate Trials (Docket No. 98) is denied and Plaintiffs' Motion for Oral Argument is denied as moot. The court will confer with the parties in the near future to schedule a new trial date.

So ordered.

Date: February 23, 2007

DAVID F. HAMILTON, JUDGE
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